Supreme Court, U.S.
FILED
FEB 7 1997
CLERK

No. 96-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Plaintiff argues that established common law limitations on recovery for emotional distress should be abandoned in this case because of Metro-North's alleged "egregious" and "outrageous" conduct. Plaintiff asks this Court to depart from the common law zone of danger test it adopted in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), and to substitute in its place a physical impact test which differs markedly from the traditional impact test under the common law. Plaintiff also would have the Court disregard the common law requirements that a plaintiff's emotional distress must be severe, result in a physical manifestation, and be established by competent medical, psychiatric, or clinical evidence.

The rule that the plaintiff asks this Court to adopt would permit untold thousands of railroad and maritime workers to file suit immediately for their concern, worry and anger if they have been exposed to any toxic substance. Thus, plaintiff asks this Court to permit the most evanescent and insubstantial claims of emotional distress to reach a jury because there may be some "impact" with a toxic substance that purportedly causes undetectable, subcellular changes, even where, as here, the plaintiff has no physical impairment and no clinical evidence of disease or exposure. Such a rule would permit almost any worker to sue, and is even broader than that suggested by the Second Circuit.

Plaintiff's invitation to this Court to create a standardless rule of recovery for fear of future injury cases under FELA should be rejected. Common law rules limiting liability for negligence cannot be abandoned, as plaintiff suggests, simply because a defendant's conduct is characterized by the plaintiff as "egregious" or "offensive." Plaintiff's reliance on intentional infliction of emotional distress and outrageous conduct cases (without indicating they are such) is misleading. This is not an intentional tort case. Rather, it is a negligence case, and Petitioner stipulated to its negligence.

The common law has always recognized that negligence claims differ substantially from claims for intentional infliction of emotional distress and that different threshold requirements apply. *See, e.g.*, Restatement (Second) of Torts § 46 (1965) (intentional, outrageous infliction of emotional distress; no requirement that the distress result in bodily harm); *id.* §§ 312, 313 (negligent infliction of emotional distress; requiring resultant bodily harm).

Moreover, contrary to plaintiff's contentions, the remedial nature of FELA is not a reason for this Court to reject established common law prerequisites to recovery for emotional distress. FELA's primary purpose is to compensate plaintiffs with legally cognizable injuries,[1] and plaintiff here does not have such an injury. As this Court recognized in *Gottshall*, common law jurisprudence continues to guard against trivial, fraudulent and unlimited claims for negligent infliction of emotional distress, and the federal common law of FELA must do so as well. *See* 512 U.S. at 557. The Court should reject the wholesale repudiation of common law principles urged by plaintiff in this case.

ARGUMENT

I. PLAINTIFF IMPROPERLY RELIES ON THE PHYSICAL IMPACT TEST

Plaintiff does not contend that he was in a "zone of danger," as that term is understood under *Gottshall* and the common law. Rather, urging that a "claim for toxic exposure is by its very nature a 'physical impact' claim," he attempts to argue that the zone of danger test adopted by this

[1] *See Gottshall*, 512 U.S. at 555 ("FELA was intended to provide *compensation* for the injuries and deaths caused by the physical dangers of railroad work . . . .") (emphasis added); S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910) (purpose of FELA was to facilitate recovery by injured railway workers).

Court in *Gottshall* "subsumes" a "physical impact" test that permits recovery regardless of whether the plaintiff was in a zone of danger of imminent physical harm. Resp. Br. at 19, 22. This argument is based on an untenable reading of *Gottshall*, in which this Court clearly explained that it was rejecting the physical impact test. *See* 512 U.S. at 556. It is based as well on a mistaken view of the common law zone of danger and physical impact tests. Indeed, while plaintiff colors his argument with repeated appeals to the common law, in fact he is asking this Court to make an extravagant departure from long-settled principles of negligence liability.

Contrary to plaintiff's claims, the physical impact test was historically confined to near-miss situations, where a plaintiff suffered fright at the apprehension of imminent physical harm. It permitted recovery by some, but not all, of the plaintiffs who would recover under a zone of danger rule. Thus, in *Porter v. Delaware, L. & W. R. Co.*, 63 A. 860 (N.J. 1906), and *Morton v. Stack*, 170 N.E. 869 (Ohio 1930), the dust-in-the-eye and smoke cases cited by plaintiff's *amici*, plaintiffs sought recovery for fright suffered in situations of imminent physical peril. In *Morton*, plaintiff was trapped in a smoke-filled burning apartment building, while in *Porter*, plaintiff was passing under a railroad bridge when it collapsed and came crashing down, showering plaintiff with debris and dust. Indeed, the early physical impact cases cited by this Court in *Gottshall*, and by Professors Prosser and Keeton in their treatise, permitted recovery where plaintiffs suffered some impact or injury while in a zone of danger.[2] These physical impact cases do not support

[2] All the early cases under the physical impact rule cited by this Court in *Gottshall*, 512 U.S. at 547 n.6, involved zone of danger type situations: *Ewing v. Pittsburgh, C., C. & St. L. Ry. Co.*, 23 A. 340 (Pa. 1892) (derailed train crashed against house); *Spade v. Lynn & B. R. Co.*, 47 N.E. 88 (Mass. 1897) (plaintiff suffered fright during disturbance in

plaintiff's claims that recovery should be allowed for persons, such as himself, who were never in a zone of danger and never feared imminent bodily injury.[3]

Moreover, as Professor Pearson has written, under the early zone of danger cases, it is evident that "not all fright is compensable, but *only* that 'which arises from a reasonable fear of *immediate* personal injury to oneself.'" Pearson,

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which conductor ejected drunken passenger); *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896) (pregnant woman nearly struck by horse-drawn streetcar). *See also Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991) (car crash); W.P. Keeton *et al.*, *Prosser & Keeton on the Law of Torts*, at 363-64 n.42-n.51 (5th ed. 1984) (citing as "slight impact" cases *Homans v. Boston Elevated Ry. Co.*, 62 N.E. 737 (Mass. 1902) (railway collision); *Hess v. Philadelphia Transp. Co.*, 56 A.2d 89 (Pa. 1948) (car hit by loose trolley wire, blinding flash); *Clark v. Choctawhatchee Elec. Co-op.*, 107 So. 2d 609 (Fla. 1958) (power line fell on gasoline station, causing blinding flash, loud report, and fire nearby); *Johnson Freight Lines v. Tallent*, 384 S.W.2d 46 (Tenn. Ct. App. 1964) (three-vehicle collision); *Boston v. Chesapeake & O. Ry. Co.*, 61 N.E.2d 326 (Ind. 1945) (plaintiff's car hit and dragged by train); *Driscoll v. Gaffey*, 92 N.E. 1010 (Mass. 1910) (blasting sent rock crashing through house); *Comstock v. Wilson*, 177 N.E. 431 (N.Y. 1931) (car collision); *Freedman v. Eastern Mass. St. Ry. Co.*, 12 N.E.2d 739 (Mass. 1938) (streetcar scraped into truck, breaking window of streetcar opposite passenger); *Zelinsky v. Chimics*, 175 A.2d 351 (Pa. Super. Ct. 1961) (car accident)).

[3] Although Professor Pearson now argues that the zone of danger test subsumes a broad physical impact test, he has criticized the expansion of the physical impact rule to permit recovery in cases not involving a near-miss accident or other traumatic event. *See* Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 n.66 (1982). Professor Pearson now relies on *Christy Bros. Circus v. Turnage*, 144 S.E. 680 (Ga. Ct. App. 1928), *overruled by OB-GYN Assocs. v. Littleton*, 386 S.E.2d 146 (Ga. 1989), which he previously characterized as a "bizarre case," in which "plaintiff was able to recover even though the impact caused no harm at all, and the emotional harm did not involve fear." Pearson, *supra*, at 488 n.66.

supra, at 489 (quoting *Dulieu v. White & Sons*, 2 K.B. 669 (1901) (emphasis added)). The opinions in the early zone of danger cases do not evince any intention by the courts to subsume a rule permitting recovery when there is no threat of immediate personal injury. Thus, even assuming *arguendo* that a physical impact test "survives within the zone of danger test," as plaintiff repeatedly asserts, it is not a test that permits recovery outside the zone of danger.

Plaintiff also incorrectly contends that recent cases applying the *Gottshall* zone of danger test have "all" recognized that the physical impact test is viable under the zone of danger test. *See* Resp. Br. at 21. In fact, recent FELA cases applying the zone of danger test before and after *Gottshall* have overwhelmingly held that to recover the plaintiff must have been present in a zone of danger of *imminent* physical harm. *See* Pet. Br. at 24-25.[4]

In addition, *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *modified*, 797 F.2d 256 (5th Cir. 1986), upon which plaintiff relies extensively, does not support his position that emotional distress is actionable where a plaintiff neither has a physical injury nor meets the zone of danger test. In *Hagerty*, the court explicitly determined that the plaintiff had suffered a physical injury with physical symptoms, including dizziness and leg cramps. *See* 788 F.2d at

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[4] Plaintiff's reliance on *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995), is misplaced because plaintiff was in a zone of danger of immediate physical injury and actually suffered such an injury. *See* Pet. Br. at 27 n.17. Plaintiff's citation to *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530 (3d Cir. 1995) (on remand), is inapposite because plaintiff there alleged that he was at risk of imminent physical harm (a heart attack) and was not allowed to recover based on his exposure to heat and sun. Nor does *Marschand v. Norfolk & Western Railway Co.*, 81 F.3d 714 (7th Cir. 1996), support plaintiff, as in that case the court refused to consider plaintiff's late-presented argument regarding the physical impact rule.

317, 318 n.1. In clarifying its original opinion on reconsideration, the Fifth Circuit disavowed *dicta* in *Hagerty* suggesting that physical injury was not a precondition to recovery for negligent infliction of emotional distress in a fact situation of exposure to potentially injurious substances. *See* 797 F.2d 256, 256 (stating that original opinion "assumed an actionable injury"). As Judge Jolly explained, under *Hagerty* as modified, to recover under the Jones Act[5] on emotional distress claims,

> a seaman must show either a traumatic event giving rise to physical or mental injury, or physical injury resulting from the incremental effect of harmful substances. The modification *eliminates the possibility that a seaman may recover for cancerphobia, without showing either physical injury or a traumatic event, simply because he served on a ship containing asbestos.*

Id. (Jolly, J., dissenting from denial of rehearing on banc) (emphasis added). Thus, under *Hagerty*, because plaintiff here can show neither a physical injury nor a traumatic event, he is barred from recovering for negligent infliction of emotional distress.[6]

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[5] The Jones Act incorporates § 1 of FELA. *See* Pet. Br. at 9 n.4.

[6] Plaintiff's reliance on two Third Circuit cases purporting to apply Pennsylvania law, *Plummer v. United States*, 580 F.2d 72 (3d Cir. 1978), and *Kahle v. Glosser Bros.*, 462 F.2d 815 (3d Cir. 1972), is misplaced because the Pennsylvania Supreme Court recently made clear that in Pennsylvania not only does the impact test not survive within the zone of danger test, but that asbestos exposure without resulting physical injury does not support a claim for negligent infliction of emotional distress. *See Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 n.8 (Pa. 1996); *Gregorio v. Zeluck*, 678 A.2d 810 (Pa. Super. Ct. 1996) (relying on *Simmons*, holding that in non-zone of danger case "plaintiff must demonstrate some type of physical injury," not merely physical impact,

Moreover, restricting recovery to persons in a zone of danger of immediate physical injury, as opposed to persons such as plaintiff who claim that they have emotional distress because of the possibility of some future harm, is not arbitrary line-drawing. The courts that created the zone of danger test at the end of the last century recognized that as a factual matter fright and shock suffered in a near-miss situation of immediate physical peril were likely to produce severe mental and physical injuries. *See, e.g., Mack v. South Bound R.R. Co.*, 29 S.E. 905, 906 (S.C. 1898) (fright could cause mental suffering, serious injury to nervous system, and incapacitation for normal duties of life); *Pankopf v. Hinkley*, 123 N.W. 625, 626 (Wis. 1909) ("imminent apparent danger of injury or death" may result in permanent physical and mental injuries); *Stewart v. Arkansas S. R. Co.*, 36 So. 676, 677 (La. 1904) (sudden and extreme fright can cause nervous disease, miscarriage, and insanity).

The recognition in the early zone of danger cases of the serious consequences of fright and shock in near miss situations is confirmed by modern psychiatric authorities on post-traumatic stress disorder. The American Psychiatric Association's authoritative manual on mental disorders describes post-traumatic stress disorder as

> the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to

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to recover for emotional distress), *appeal denied*, __ A.2d __ (Pa. Dec. 5, 1996). *Corgan v. Muehling*, 574 N.E.2d 602 (Ill. 1991), also cited by plaintiff, is inapposite because it involved a malpractice claim against a psychiatrist who had sexual relations with a patient and was neither an impact nor zone of danger case, but was based on a distinction between "direct" victims and bystanders, which has no parallel under *Gottshall*.

> one's physical integrity . . . . The person's response to the event must involve intense fear, helplessness, or horror. . . . [T]he disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Diagnostic and Statistical Manual of Mental Disorders 424 (4th ed. 1994) ("*DSM-IV*"); *see also Harrison's Principles of Internal Medicine* 2411 (13th ed. 1994) (patients with post-traumatic stress disorder "have experienced a severe catastrophic event that is outside the range of normal human experience"). *DSM-IV* lists accidents and natural and man-made disasters among the traumatic events that may precipitate post-traumatic stress disorder. *See DSM-IV* at 424. It does not indicate that knowledge that one has been exposed to a potentially harmful substance such as asbestos is likely to give rise to any comparable emotional injury. Moreover, plaintiff and his *amici* do not cite any scientific research, or any authority of any kind, showing that knowledge that one has been exposed to asbestos is likely to be attended by the kind of serious emotional injury that results from near-miss situations. Instead, plaintiff asks for an unprecedented rule of law that would permit recovery for non-severe emotional distress.

Plaintiff is asking this Court to apply in toxic exposure cases a "threshold" test, not limited by the factual parameters of a zone of danger, that allows a plaintiff with no physical injury and no clinical evidence of disease or even of exposure to sue for anger and fear of cancer, even though the anger and fear are not "severe" by any definition. The "heavy burden" that plaintiff contends exists under the approach he urges is illusory. *See* Resp. Br. at 42. Under plaintiff's "threshold" test, the claims of every plaintiff who has had an encounter with a potentially harmful substance (whether or not any illness or impairment results) will go to

the jury. The only apparent limitation is that plaintiff find an expert to state that his exposure amounts to an "impact" and that a "reasonable" person could fear the possibility of disease from such an impact. Such expert testimony need be based not upon the plaintiff's own medical records, but, as is the case here, upon a theoretical description of "subcellular" changes that may or may not be occurring.[7] This is no limitation or "threshold" at all. As courts have come to recognize in this age of the professional witness, "[t]here is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" *Albers v. Church of the Nazarene*, 698 F.2d 852, 858 (7th Cir. 1983) (citation omitted); *see also E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995) ("Professional expert witnesses are available to render an opinion on almost any theory, regardless of its merit.").

More than 190 carcinogenic or probable carcinogenic substances have been identified,[8] and countless people are exposed to such substances in the workplace every day, most of whom have no adverse health consequences and will have none. Under plaintiff's "threshold" test, any such person who wishes to sue for negligent infliction of emotional distress will have his day in court. Allowing such claims would result in a flood of litigation that could overwhelm the court system as well as devastate defendants. None of plaintiff's arguments justify opening such a gaping loophole

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[7] *See Eagle-Picher Indus. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 19 & n.3 (1st Cir. 1982) (discussing "fiction that bodily injury is contemporaneous with exposure to asbestos" and noting that "the body's natural mechanisms may remove the fibers before they become embedded in the lungs"), *cert. denied*, 460 U.S. 1028 (1983); *see also* Owens Illinois Amicus Br. at 10-11.

[8] *See* U.S. Department of Health and Human Services, National Toxicology Program, *7th Annual Report on Carcinogens* (1994).

into the carefully confined limits of the zone of danger test adopted by this Court in *Gottshall*.

II. THE *SCHWEITZER* RULE REQUIRING PHYSICAL INJURY GOVERNS THIS CASE

Notwithstanding the Second Circuit's acknowledgement that its opinion is directly contrary to *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), plaintiff argues that *Schweitzer* is inapplicable to this emotional distress case because *Schweitzer* was a physical injury case. *See* Resp. Br. at 30-32. Contrary to plaintiff's assertions, the *Schweitzer* rule that a plaintiff exposed to asbestos has no cause of action until he develops an asbestos-related disease properly governs this emotional distress case. Under *Gottshall*, claims for emotional distress, in the absence of physical injury, are cognizable only when they meet the zone of danger test. Because this asbestos exposure case does not meet the zone of danger test, the fact that under *Schweitzer* plaintiff has no physical injury is, as a matter of law, dispositive of his emotional distress claims. *See* Pet. Br. at 9, 21-28.

Plaintiff also incorrectly asserts that *Schweitzer* is inapplicable because it was a bankruptcy case. However, in order to resolve the bankruptcy issues in that case, the *Schweitzer* court had to determine, based on "generally applicable principles of tort law," when an asbestos claimant has a cognizable injury under FELA. 758 F.2d at 941-42. Indeed, the *Schweitzer* rule that an asbestos plaintiff has no cause of action until he manifests an asbestos-related disease has been repeatedly followed in non-bankruptcy cases involving emotional distress claims. *See* Pet. Br. at 10-12.[9]

[9] The asbestos exposure cases cited in Appendix A to plaintiff's brief do not support his position. In all but two of those cases, plaintiffs, unlike plaintiff here, had asbestosis or pleural plaques. Moreover, those two cases are of dubious authority. *Gerardi v. Nuclear Util. Servs.*, 566 N.Y.S.2d 1002 (Sup. Ct. 1991), a trial court decision, has been superseded by *Doner v. Ed Adams Contracting Inc.*, 617 N.Y.S.2d 565 (App. Div. 1994), which denied emotional distress recovery in the absence of asbestos-related injury. *In re Moorenovich*, 634 F. Supp. 634 (D. Me. 1986) (Maine law), is of doubtful validity in light of *Bernier v. Raymark Indus.*, 516 A.2d 534 (Me. 1986) (following *Schweitzer*).

In addition, plaintiff claims that whenever a defendant owes and breaches a direct duty to plaintiff, the plaintiff may recover for emotional distress without a showing of physical injury or physical manifestation of distress. *See* Resp. Br. at 27-28. This proposition, for which plaintiff cites no FELA cases, has been applied in cases where a physician negligently misdiagnosed a plaintiff with a disease such as AIDS or syphilis, causing distress to plaintiff and family. *See, e.g., Chizmar v. Mackie*, 896 P.2d 196, 205 (Alaska 1995); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 817-21 (Cal. 1980) (in bank).[10] These cases offer no support for altering the standards for recovery under FELA. Indeed, every FELA employer owes his employees a duty. *See Gottshall*, 512 U.S. at 550. Therefore, under the rule proposed by plaintiff, every claim for negligent infliction of emotional distress would be cognizable with or without a physical injury and with or without presence in a zone of

[10] Plaintiff cites two exposure cases on this point, one of which, *Gerardi*, is not good law, *see* n.9 *supra*, the other of which, *Campbell v. A.C. Equip. Servs. Corp.*, 610 N.E.2d 745 (Ill. Ct. App. 1993), did not allow recovery. Plaintiff's other cases are not zone of danger cases, involve factually inapposite situations, and shed no light on proper standards for recovery under FELA: *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (boyfriend surreptitiously videotaped girlfriend); *Jacoves v. United Merchandising Corp.*, 11 Cal. Rptr. 2d 468 (Ct. App. 1992) (parents sued hospital and gun store for distress caused by son's suicide); *Oswald v. LeGrand*, 453 N.W.2d 634 (Iowa 1990) (medical malpractice case involving miscarriage); *Mortise v. United States*, 102 F.3d 693 (2d Cir. 1996) (no recovery for couple captured in National Guard war games).

danger. Thus, the rule plaintiff proposes and the cases he cites are incompatible with both *Gottshall* and *Schweitzer*.

As discussed in Metro-North's Brief at 18-20, the *Schweitzer* rule accommodates the policies that underlie the statute of limitations, the discovery rule, and the single recovery rule, thus protecting the interests of both plaintiffs and defendants.[11] Plaintiff incorrectly asserts that the cases cited by Metro-North regarding the single recovery rule are inapposite because they concerned the right of a widow to bring a claim under FELA after the employee had already recovered for the underlying injury. *See* Resp. Br. at 38 n.17. Contrary to plaintiff's assertion, these cases are based upon the principle that under FELA a plaintiff may have only one recovery based upon a single incident or wrong. *See Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 56 (1931) (under FELA, a widow's right of action was "dependent upon the continuance of a right in the injured employee at the time of his death"; therefore, "an effective release by the employee makes it impossible for his administrator to recover"). Furthermore, in construing section 1 of FELA in Jones Act cases, courts have recognized that the single recovery rule applies. *See Hicks v. Hines Inc.*, 826 F.2d 1543 (6th Cir. 1987) (under Jones Act, single cause of action for all injuries resulting from exposure to toxic chemical accrued upon discovery of first injury (eye problems); no separate cause of action for later bladder cancer); *Hagerty*, 788 F.2d at 316-17 (under Jones Act, plaintiff with physical

[11] Plaintiff's contention that the issue of claim-splitting is not properly before this Court is incorrect. Metro-North is not raising a new issue for this Court to decide, *i.e.*, whether some future claim by plaintiff would be barred under the single recovery rule. Rather, the single recovery rule under FELA and the policy considerations underlying it are relevant to and should inform the resolution of issues indisputably before this Court, in particular the application of the *Schweitzer* rule to this case.

injury after chemical drenching could sue only once for all injuries present and future; no separate disease rule applies).

Thus, under the law as it currently exists, the single recovery rule applies in FELA litigation. As discussed in Metro-North's Brief at 18-20, the *Schweitzer* rule postponing recovery until an asbestos-related physical injury develops would preserve a plaintiff's emotional distress claims until that time and would obviate potential problems under both the statute of limitations and the single recovery rule. Moreover, in contrast to the physical impact test urged by plaintiff, the *Schweitzer* physical injury requirement functions in exposure cases as a true threshold test, allowing courts to winnow out emotional distress claims that are unripe or insubstantial and thereby preventing a flood of claims that could overwhelm judicial resources and devastate defendants.

III. THE COMMON LAW REQUIREMENTS OF SEVERITY, PHYSICAL MANIFESTATION, AND MEDICAL OR PSYCHIATRIC EVIDENCE ARE APPLICABLE IN ZONE OF DANGER CASES

Plaintiff and his *amici* incorrectly claim that Metro-North seeks to engraft on the zone of danger test new and additional requirements: severity, physical manifestation, and competent medical or psychiatric evidence of distress. *See* Resp. Br. at 25-30. Contrary to plaintiff's claims, the principle is universally accepted in negligent infliction of emotional distress cases that only *severe* emotional distress is compensable, under whatever threshold test is applied, including the zone of danger test. *See* Pet. Br. at 37-40. Moreover, zone of danger cases have required that a plaintiff's emotional distress result in physical manifestations, *see, e.g., Carlson v. Illinois Farmers Ins. Co.*, 520 N.W.2d 534, 536 (Minn. Ct. App. 1994); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va.

1973),[12] and have required competent medical or psychiatric evidence to establish compensable emotional distress. *See Vance v. Consolidated Rail Corp.*, 652 N.E.2d 776, 784 (Ohio 1995), *cert. denied*, 116 S. Ct. 776 (1996).

The cases cited by plaintiff and his *amici* do not support their contention that non-severe emotional distress is a compensable injury. In *Marriott v. Sedco Forex International Resources, Ltd.*, the parties in fact "stipulated that [the plaintiff] had suffered 'severe emotional distress.'" 827 F. Supp. 59, 72 & n.18 (D. Mass. 1993). In *Anselmi v. Penrod Drilling Corp.*, where plaintiff had been diagnosed with post-traumatic stress disorder requiring hospitalization and prescriptive medications, and was unable to work, the court noted that "the defendant does not dispute that [plaintiff] appears to have suffered severe emotional distress." 813 F. Supp. 436, 442 (E.D. La. 1993). In *Hagerty*, the court specifically stated a rule of law that permits recovery for "serious mental distress." *See* 788 F.2d at 318. Moreover, in *Gates v. Richardson*, the court rejected a separate requirement of proof of the seriousness of emotional distress in relative bystander cases because the court believed that the specific circumstances required for recovery, namely, witnessing a close relative killed or gravely injured in a serious accident, in and of themselves guarantee genuine severe shock and distress. *See* 719 P.2d 193, 200-01 (Wyo. 1986).

Furthermore, plaintiff's repeated contention that the circumstances of this asbestos exposure case guarantee the "genuineness" of his distress is precisely the type of approach that was rejected by this Court in *Gottshall*, because

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[12] *See also* Douglas Bryan Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices*, 33 Vill. L. Rev. 781, 796 (1988) ("[A] large number of jurisdictions follow a combination of both the zone of danger and physical manifestation tests . . . ."); *Gottshall*, 512 U.S. at 549 n.11.

it improperly disregarded the common law limits placed on recovery for negligent infliction of emotional distress. *See* 512 U.S. at 550-52. Indeed, if exposure to asbestos, even significant exposure to asbestos, were found to guarantee the genuineness of a plaintiff's emotional distress, more than 21 million Americans would have a cause of action for the negligent infliction of emotional distress. *See* Pet. Br. at 17. However, far from accepting asbestos exposure as a circumstance guaranteeing the genuineness of distress, courts have held that as a matter of law fear of disease arising from asbestos exposure is not reasonable and therefore not compensable in the absence of an existing asbestos-related physical injury. In *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1570 (D. Haw. 1990), the court explained that such fear is not reasonable given "that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment and that of the impairment group fewer still eventually develop lung cancer."[13] Notably, in *Ironbound Health Rights Advisory Commission v. Diamond Shamrock Chemicals Co.*, 578 A.2d 1248 (N.J. Super. Ct. App. Div. 1990), the court rejected, for reasons equally applicable here, emotional distress claims of plaintiffs alleging exposure to a toxic substance (dioxin) but no existing physical injury. The court explained:

> [Plaintiffs'] claimed emotional distress is the fear that they might some day become seriously ill from the previous inhalation and absorption of dioxin. They are apprehensive.

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[13] *Accord Doner*, 617 N.Y.S.2d at 566 (dismissing emotional distress claims because fear of cancer based on exposure to asbestos with no resulting physical ailment is not reasonable); *cf. Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 816 (Cal. 1993) (in bank) (requiring plaintiffs with no physical injury to prove that they more likely than not would develop cancer as precondition to recovery for emotional distress).

> Their concerns may be understandable but they are not compensable.

Id. at 1249-50.

In sum, plaintiff's claim that non-severe emotional distress is compensable simply because it is based on a "physical impact" consisting of workplace exposure to asbestos is not supported by the case law or by the policies identified by this Court in *Gottshall*.

IV. PLAINTIFF HAS NOT SUSTAINED "BODILY HARM"

Plaintiff argues that, although he has no "physical injury," he has "bodily harm," which justifies recovery of damages for non-severe emotional distress. *See* Resp. Br. at 23-24. The authorities cited by plaintiff do not support his false distinction between bodily harm and physical injury.[14] Other than the Second Circuit, no court, even those cited by plaintiff, has allowed damages for non-severe emotional distress unless such damages flow from a cognizable physical injury or another independent tort.

Plaintiff incorrectly relies upon the Restatement (Second) of Torts to argue that he has suffered "bodily harm." Under the Restatement, "bodily harm" is defined as a "physical *impairment* of the condition of another's body, or physical pain or illness." Restatement § 15 (emphasis added). As used in the Restatement, the term "'[h]arm' implies a loss or detri-

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[14] Plaintiff seems to suggest that "bodily harm" is some lesser degree of harm than a "physical injury." The difference between the two terms as they are used in the Restatement (Second) of Torts is that "physical injury" is a legal term, whereas "bodily harm" is a factual term. *See* Restatement § 7. Section 924 of the Restatement, relied on by plaintiff, does not purport to change the basic rule of tort law that a plaintiff may not recover damages in the absence of an injury. *See id.* § 902 & cmt. a ("Damages flow from an injury.").

ment." *Id.* § 7 cmt. b. Only a physical change that is detrimental constitutes a bodily harm. *Id.*

Comment a to section 15 of the Restatement does not support plaintiff's position. Plaintiff gives the following partial quotation from comment a: "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." Resp. Br. at 24. Yet, the full context of comment a makes clear that the quoted sentence applies "only in the context of an action based on the intentional tort of battery." *Owens-Illinois v. Armstrong*, 591 A.2d 544, 561 (Md. Ct. Spec. App. 1991), *aff'd in part, rev'd in part on other grounds*, 604 A.2d 47 (Md.), *cert. denied*, 506 U.S. 871 (1992).[15] Thus, in *Armstrong*, the court determined that comment a was inapplicable to situations of claimed bodily harm from asbestos exposure and held that pleural plaques or thickening was not bodily harm in the absence of an objectively verifiable functional impairment. *See* 591 A.2d at 561.[16]

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[15] Similarly, plaintiff incorrectly relies on section 46 of the Restatement, which also by its terms applies only to intentional infliction of emotional distress or the tort of outrage and is not applicable to plaintiff's claims of negligent infliction of emotional distress.

[16] Many other courts have also held that pleural plaques and subclinical changes do not constitute compensable bodily injuries. *See* Pet. Br. at 45. Moreover, contrary to plaintiff's claims, both *Amendola v. Kansas City Southern Railway Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988), and *Sullivan v. Combustion Engineering*, 590 A.2d 681 (N.J. Super. Ct. App. Div.), *cert. denied*, 598 A.2d 897 (N.J. 1991), support Metro-North's position. In *Sullivan*, plaintiff had pleural thickening, a condition that the court distinguished from a lack of any "manifestation of injury" as in *Schweitzer* (and as in the present case). *See* 590 A.2d at 684-85. In *Amendola*, the court specifically found that the inhalation of asbestos fibers was not a "physical harm" that would allow plaintiffs to recover for emotional distress. 699 F. Supp. at 1403 n.3, 1410-11. *Amendola* does not support plaintiff's concocted distinction between physical injury

Under these principles, it is clear that plaintiff has sustained no bodily harm. X-rays of his lungs show no pleural plaques or thickening and no traces or effects whatsoever of asbestos exposure, much less actual physical injury. (JA 73-74) Indeed, if plaintiff's medical records contained any evidence of an objectively verifiable functional impairment, he would have an old-fashioned personal injury claim, and there would be no need to talk about a zone of danger test, physical impact, or the like.

V. FELA FORBIDS MEDICAL MONITORING DAMAGES ABSENT PRESENT INJURY

In support of his claim for medical monitoring damages, plaintiff incorrectly asserts that FELA's statutory term "injury" should be understood to mean any invasion of a legally protected interest.[17] Notably, none of the medical monitoring cases cited by plaintiff address a statutory injury requirement comparable to that of FELA *See* Resp. Br. at 44. Not only the wording of FELA ("injury or death"), but also FELA's legislative history and its interpretation by this Court indicate that the term "injury" as used in the statute requires personal injury, either physical or emotional. *See* House Judicial Committee Rep., H.R. Rep No. 1386, 60th Cong., 1st Sess. 1 (1908) ("Sections 1 and 2 of [FELA] provide that common carriers . . . shall be liable to its employees for *personal injuries* resulting from its negli-

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and physical harm; the only distinction made by *Amendola* was between physical injury or harm *causing* emotional distress and *resulting from* emotional distress. In addition, the determination of "bodily harm" in the insurance coverage cases cited by plaintiff (Resp. Br. at 24 n.11) is irrelevant to whether compensable injury exists under tort law. *See Schweitzer*, 758 F.2d at 942.

[17] Plaintiff has no present physical injury, and his alleged emotional injury cannot serve as the basis for the medical monitoring damages he seeks. *See* Pet. Br. at 46-47.

gence") (emphasis added); *Gottshall*, 512 U.S. at 542 (stating that "[o]ur task today is determining under what circumstances emotional distress may constitute 'injury' resulting from 'negligence' for purposes of the statute" and noting that when Congress enacted FELA, "its 'attention was focused primarily upon injuries and death resulting from accidents'") (citation omitted).[18] This Court's cautious approach to defining "injury" under FELA is illustrated not only by the Court's opinion in *Gottshall*, but also the Court's painstaking analysis in *Urie v. Thompson* of whether the term "injury" included occupational diseases as well as physical injuries resulting from accidents. *See* 337 U.S. 163, 180-87 (1949).

Clearly, in enacting FELA, Congress did not authorize medical monitoring damages where, as here, plaintiff has no present cognizable "injury."[19] Indeed, where Congress has desired to provide medical monitoring, it has expressly done so through statutory and regulatory programs. For example, OSHA (which is applicable to Metro-North through New

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[18] *See also Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281 (9th Cir. 1986) (FELA does not afford a cause of action for wrongful discharge and similar employment-related claims).

[19] Moreover, the validity of the Third Circuit's decisions in *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991), and 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995), upon which plaintiff relies, has been severely undermined. *See* Pet. Br. at 46. Furthermore, many of the medical monitoring cases listed in Appendix B to plaintiff's brief are improperly cited. For example, in *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995), *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448 (S.D. Ala. 1992), *Johnson v. Armstrong Cork Co.*, 645 F. Supp. 764 (W.D. La. 1986), and *Hagerty*, the plaintiffs all alleged present physical injuries. *Simmons* does not support a claim for medical monitoring absent a demonstrable physical symptom such as pleural thickening. *See* Pet. Br. at 46 n.28. *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994), in fact expressly "requires plaintiff to prove actual present injury" to receive future medical monitoring costs.

York state law[20] and applies to many other FELA employers as well) directs the Secretary of Labor to require medical monitoring where appropriate. *See* 29 U.S.C. § 655(b)(7). OSHA regulations promulgated pursuant to such authority require employers to implement medical monitoring of asbestos-exposed workers under precisely defined circumstances. *See* 29 CFR §§ 1910.1001(*l*), 1926.1101(m). Significantly, neither under OSHA nor other legislation has Congress seen fit to make medical monitoring damages available as part of a statutory system of tort recovery, subject to all the attendant uncertainties and transactional costs of litigation. *Cf. Jones v. Utilities Painting Corp.*, 603 N.Y.S.2d 546, 546 (App. Div. 1993) (taking judicial notice of medical monitoring for asbestos exposure provided under OSHA and dismissing tort claims for medical monitoring), *appeal denied*, 633 N.E.2d 489 (N.Y. 1994).

CONCLUSION

The Court should reverse the Second Circuit's decision in this case and reinstate the directed verdict entered by the district court in favor of Metro-North.

Respectfully submitted,

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[20] New York has adopted OSHA standards and regulations with regard to public employees, including employees of public authorities such as Metro-North, pursuant to N.Y. Lab. Law § 27-a(3)(c) (McKinney 1986) and § 18(b) of OSHA, 29 U.S.C. § 667(b).